

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1358

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee

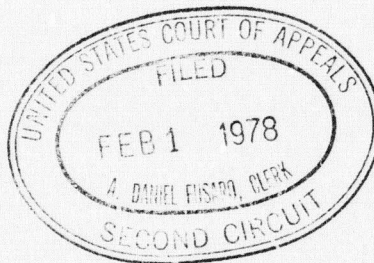
against

LOUIS BAS, JR.,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from a judgment of conviction returned by a jury verdict against the defendant-appellant, Louis Bas, Jr. ("Bas") on July 1, 1977, in the United States District Court for the Southern District of New York.

In the Fall of 1974, appellant Bas was the sole proprietor of a printing shop located in Brooklyn, New York. Among the services offered and advertised to the public by Mr. Bas was the printing of checks (43a). * Co-defendant Isiah Crutch entered Mr. Bas' shop at this time and placed orders for stationery and checks for various business enterprises. Mr. Crutch became a regular customer of Mr. Bas and placed numerous orders for printed material over a period of several months. Among the material ordered by Mr. Crutch were blank copies of bank checks drawn on various banks. The blank checks produced by Mr. Bas were forged and utilized in numerous schemes to defraud individuals, businesses and banks.

On April 13, 1977, Mr. Bas was indicted on twenty nine counts consisting of one count of conspiracy to commit wire fraud, Title 18 U.S.C. Section 371, fourteen counts of interstate transportation of forged securities, Title 18 U.S.C. Sections 2314 and 2, eight counts of fraud by wire in interstate commerce, Title 18 U.S.C. Sections 1343 and 2, and six counts of interstate transportation of a stolen motor vehicle, 18 U.S.C. Section 2312 and 2. On April 14, 1977, Mr. Bas pleaded not guilty to the entire indictment.

On June 3, 1977, the defendant Bas filed a notice of motion for a severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure. Defendant Bas' counsel submitted an affidavit setting forth the facts that he had been informed by co-defendant Crutch's counsel that Crutch admitted that Bas had no knowledge of the illegal acts charged in the indictment; that Crutch would so testify on behalf of Bas at a separate trial; and that Crutch would probably not testify on his own behalf at his own trial, (26, 27a). On June 20, 1977, defendant Bas submitted an affidavit executed by co-defendant Crutch which stated that Crutch would not testify at the trial; that he would waive his fifth amendment privilege against self incrimination and testify on behalf of co-defendant Bas at a separate trial; that he never intimated to Bas in any way that the blank checks printed by Bas would be utilized in an illegal scheme to defraud; that he always held himself out to Bas as a businessman engaged in legitimate pursuits; and that Bas had neither knowledge of nor a stake in the illegal conspiracy in which he and others were involved, (30, 31a). On June 20, 1977, Judge Robert L. Carter denied the motion for a severance without a written decision. The trial of Bas, Crutch and two other co-defendants commenced on June 20, 1977. At the trial, Bas testified on his own behalf whereas Crutch exercised his privilege and did not testify. On July 1, 1971, the jury returned a verdict wherein Bas was convicted on seven counts and acquitted on twenty two counts.

*Numbers in parentheses followed by "a" refer to pages of the appendix

On July 27, 1977, Bas was sentenced to five years in prison and released on his own recognizance pending this appeal.

ARGUMENT I

THE TRIAL JUDGE'S DENIAL OF THE MOTION FOR A SEVERANCE WAS AN ABUSE OF DISCRETION WHICH DENIED THE APPELLANT A FAIR TRIAL.

In reviewing an appeal based on a claim of wrongful denial by a trial judge to grant a severance, the appeal count must confine itself to the question of whether or not said denial was an abuse of discretion. Opper v. United States, 348 U.S. 84 (1954); United States v. Turcotte, 515 F.2d 145, 150 (2d. Cir. 1975). The crucial inquiry remains whether the appellant was so prejudiced by a joint trial under the circumstances that severance should have been granted. United States v. Finkelstein, 526 F.2d 517, 523. Finkelstein considered the propriety of severances where exculpation by a co-defendant is claimed. The Court held that in passing upon a severance motion, the trial judge should consider: "(1) the sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege, . . . (2) The degree to which the exculpatory testimony would be cumulative, . . . (3) the counter arguments of judicial economy, . . . (4) the likelihood that the testimony would be subject to substantial, damaging impeachment." 526 F.2d at 523-524.

The Crutch affidavit (30, 31a) clearly meets the first test in that he explicitly set forth his willingness to testify at a severed trial and waive his Fifth Amendment privilege.

The second test is clearly met in that the testimony concerns the relationship of Bas and Crutch and only

the two individuals could testify as to the exact nature of the relationship and would not therefore be cumulative.

The need for judicial economy must be deemed a lesser priority in a case where the denied exculpatory testimony is crucial to the defense. As stated in United States v. Shuford, 454 F.2d 772 (4th Cir. 1971) at 776, "Notwithstanding the need for efficiency in judicial administration, a joint trial is inappropriate if it sacrifices a defendant's right to a fundamentally fair trial." The issue of judicial economy verses the need for a severance was also considered in United States v. Echeles, 352 F.2d 892 (7th Cir. 1965) wherein the Court held at 896, "Nevertheless, a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication may not be had at the expense of a defendant's right to a fundamentally fair trial."

The fourth requirement of Finkelstein is also clearly met in that there was no evidence offered by the Government which could substantially impeach the claim of Crutch and Bas that Bas took no part in no had knowledge of the illegal activities. See Argument II herein. In any event, credibility is a question which the jury must decide. See Shuford, supra at 777. Furthermore, the fact that Mr. Crutch came forward to exonerate Mr. Bas but did not do so for his brother, Eugene Crutch, nor his former lover, Susan Abbott, would in itself have had great weight and thus would not have been subject to substantial, damaging impeachment.

The issue of whether or not a severance should be granted when a claim is made that the denial of the motion will prevent

a co-defendant from proffering exculpatory testimony has been considered in numerous courts of appeal in various circuits. An in depth discussion of said cases demonstrates beyond peradventure that the failure to grant Bas a severance was tantamount to an abuse of discretion on the part of the trial judge so as to deny Bas a fair trial.

The decision in United States v. Echeles, 352F.2d 892 (7th Cir. 1965) is clearly on point. Echeles was an attorney who represented Arrington in a narcotics case. Arrington perjured himself and submitted a phony hotel registration card in connection with an alibi defense. Witnesses said that Echeles knew of the perjury and phony registration card and Echeles was charged with suborning perjury, impeding the administration of justice and conspiracy. Arrington was charged as a co-defendant. Arrington, before the joint trial, acknowledged that Echeles had no knowledge of the wrongdoing. Echeles' motion for a severance in order to obtain the exculpatory testimony of Arrington was denied and Echeles was convicted. In discussing the failure to grant the severance, the Court held at 898, "At this juncture, we hold merely that, having knowledge of Arrington's record testimony protesting Echeles innocence, and considering the obvious importance of such testimony to Echeles, it was error to deny the motion for a separate trial. It should have been clear at the outset that a fair trial for Echeles necessitated providing him the opportunity of getting the Arrington evidence before the jury, regardless of how we might

regard the credibility of that witness or the weight of his testimony".

Another case exactly on point is United States v. Shuford 454 F.2d 772 (4th Cir. 1971). Shuford was charged with participating in a scheme to present false billing to a medical laboratory. The Government's chief prosecution witness, Long, testified that Shuford was aware of the fraudulent scheme. Jordan, a co-defendant, was the only witness Shuford could present to controvert Long's damaging testimony. Shuford's motion for a severance from Jordan was denied and Shuford and Jordan were convicted of conspiracy. Shuford contended that the denial of the severance so prejudiced his defense as to deny him a fair trial. The Court held at 774, "This case raises one of the problems sometimes encountered when two criminal defendants, each surrounded by a multitude of procedural protections, are tried jointly and the effectuation of one defendant's rights necessarily works an infringement on the rights of the other." Continuing at 776, the Court recognized that, " . . . rejection of the severance motion prejudicially denied Shuford the opportunity to present testimony highly relevant in the resolution of the issue of guilt or innocence. . . At the trial, Jordan's testimony was sought by Shuford in regard to a crucial fact on which the Government and Shuford were in sharp disagreement, namely the precise nature of Shuford's instructions to Long regarding billing practices." At 777, "No other witness testified regarding Shuford's instructions to Long. Indeed, the only other

potential witness with direct knowledge of this phase of the case was Jordon, who, in the absence of a severance, declined to take the stand." Furthermore, the Court held at 777, "In a situation where elusive quality of credibility is of such importance, the jury should have the benefit of all relevant testimony likely to shed light on the situation. We think that the denial of the severance, resulting in withholding the witness' testimony on such a crucial point so tipped the scales against Shuford that he failed to receive a fair trial. A verdict based so heavily on less than the full available testimony, where the missing testimony could, with relative ease, have been procured, should not stand."

Another case which indicates that the failure to grant Bas' motion for a severance was an abuse of discretion is United States v. Martinez, 486 F.2d 15 (5th Cir. 1973). The defendant Huila was observed placing a package containing marijuana on a dock. The package was picked up by Martinez and both were charged with controlled substance violations and conspiracy. In reversing the conviction of Huila due to the failure of the trial judge to grant a severance, the Court held at 22-23, "The importance of Martinez' exculpatory testimony to Huila's defense is apparent. The crucial question to Huila was whether he had knowledge, either of the plan to import the marijuana, or that the package which he took from the M/V Montego and placed on the dock actually contained marijuana. Martinez was the only individual other than Huila himself in a position directly to rebut the Government's circumstantial evidence of Huila's knowledge of these facts."

Also in accord with the above cases, see United States v.

Morrow, 537, F.2d 120 (5th Cir. 1976); Byrd v. Wainwright, 428 F.2d 101- (5th Cir. 1970); United States v. Wilson, 500 F.2d 715 (5th Cir. 1974); United States v. Gleason, 259 F. Supp. 282 (D.C.N.Y. 1966);

When an appellant challenges the refusal of a trial judge to grant a motion to sever, he shoulders the burden of making a clear showing that prejudice resulting in the denial of a fair trial flowed from the failure to grant the motion. United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Iacovetti, 466 F. 2d 1147 (5th Cir. 1972). The record below establishes beyond question that the prejudice to Bas was clearly demonstrated to the Court both before the trial and after the verdict as well.

On June 20, 1977, before the trial commenced, the Crutch affidavit was presented to the Court (30, 31a). Upon reviewing the Crutch affidavit, Assistant United States Attorney Epstein objected to the motion for a severance based upon his contention that the affidavit did not set forth with enough specificity the facts that would exonerate Bas (34, 35a). Judge Carter responded by stating,

"Where is this lacking in specificity? It says that he (Crutch) utilized the man's services, that he never intimated to him that it would be used illegally. He never intimated to Mr. Bas that it would be used illegally, that's what it says, and it's obvious to me, according to your theory, he was the mastermind behind all of it. He certainly ought to know if he (Bas) was involved. Just tell me where it is not sufficient" (35, 36a).

In response to the Court's questions, Mr. Epstein set forth certain allegations including one that Miss Susan Abbott, the

Government's chief prosecution witness, would testify as to what Crutch told her about Bas and the amount of money paid to Bas. (37. 28a). In response to Mr. Epstein's allegations, Mr. Miller, Bas' counsel stated,

"Every fact that Mr. Epstein has represented to the Court as being a fact insofar as the amount of checks that were done, insofar as the amount of money that was received are in dispute, and it is only Mr. Crutch that can answer those questions, because he did deal with Mr. Bas on 90 per cent of those occasions. But, in any event, the heart of Bas' defense will be his dealings with Mr. Crutch And if we do not have Mr. Crutch's testimony, we do not have a defense and the Court will be depriving us of our defense. The understanding between Mr. Crutch and Miss Abbott, which Mr. Epstein alluded to, also goes to the heart of the defense, and if we cannot give Mr. Crutch's version of what happened between himself and Miss Abbott, we are deprived in another way of a defense. So I think it is quite clear that if we do not have Mr. Crutch's testimony, we are going to be deprived of presenting a defense in this matter." (39a)

Judge Carter responded,

".... but I think the safest thing for me to do is to tentatively deny the motion. As the trial proceeds and I become more familiar with the facts in the case, if it gets to that level, we will talk about it again. It may well be that I will change my mind. But at the present time, on the basis of what has been presented to me, I would find it, frankly, incredible, if a large number of checks were printed on various banks brought to him by one man who ordered a printing of cashier's checks and so forth that Mr. Bas would not have reason to suspect illegality. But in any event, you haven't lost the battle; I'll have to have some time to get more familiar with the facts, and you may renew the motion at that time." (40a)

On the second day of the trial, June 21, the severance motion was renewed by Bas' counsel. (41a). In response, the Court stated,

"I know. But that is not going to be allowed. There is no point to that. I appreciate your persistence, but, please I have denied it. I have denied it the motion about four or five times" (41a).

The above cited exchanges between the Court and counsel are indicative of the errors which occurred. First, the trial judge seemed to recognize the validity of the motion for the severance based on the Crutch affidavit (30, 31a). In spite of this recognition, the next time the severance question was raised, the Court claimed that the motion had been denied four or five times. The record reveals that this was clearly not the case. Secondly, the judge's remarks concerning his personal belief that the Crutch affidavit was "incredible" in that Bas should have had "reason to suspect illegality" was a consideration for the jury as a matter of fact. It was not a proper consideration for the judge to make in deciding the motion for a severance. See Echeles, Shuford, and Martinez, supra.

The denial of the severance motion was an abuse of discretion on the part of the trial judge and resulted in denying Bas a fair trial. The affidavit of Bas' counsel which sets forth the substance of his conversations with three jurors after the verdict proves the proposition (154, 155a). The interviewed jurors made two points. First, they stated that they would have voted for acquittal on all counts if Crutch would have corroborated Bas' testimony that Bas had neither knowledge of nor stake in the illegal venture. Secondly, and of equal importance, the jurors believed that Crutch's failure to take the stand and corroborate Bas' testimony was tantamount to a denial by Crutch of Bas' testimony.

It must be pointed out again that Crutch was the only person who could corroborate Bas' claim of innocence. Without Crutch's testimony, Bas was deprived of crucial evidence of his innocence. In this connection, see the Court's instructions to the jury that, "The testimony of a defendant must be considered by you as the testimony of any other witness. You must determine, therefore, the credibility of Louis Bas' testimony and in so doing you must consider the deep personal interest which every defendant has in the outcome of his case. Indeed, it is fair to say that a defendant has the greatest stake in the outcome. A defendant's interest in the result of his trial is of a character possessed by no other witness. That interest requires that you receive such testimony with caution and subject it to the most careful scrutiny" (149a). The cited instructions, which were completely proper, only serves to demonstrate the insurmountable roadblock placed in Bas' way. Bas was protesting his innocence. The only person who could corroborate the claim sat mute. Crutch's failure to testify forced the jury to render a verdict of guilty since his silence indicated to the jury that Bas was lying. Furthermore, in light of the above instructions, the jury had no choice but to disbelieve Bas' uncorroborated claim of innocence.

In conclusion, the trial court's failure to grant the motion for severance resulted in an abuse of discretion in that it prevented Bas from proffering crucial exculpatory evidence by his co-defendant, and thus resulted in a denial of a fair trial.

ARGUMENT II

THE EVIDENCE AGAINST THE APPELLANT WAS LEGALLY INSUFFICIENT TO SUSTAIN THE VERDICT

When considering an appeal wherein the appellant claims that the evidence introduced at trial was insufficient to sustain a guilty verdict, the Court must consider the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60 (1942). The determining inquiry is whether there is substantial evidence upon which a jury might reasonably base a finding that the accused is guilty beyond a reasonable doubt. Blachly v. United States, 380 F.2d 665 (5th Cir. 1967). While the evidence must be viewed in the light most favorable to the Government, complete judicial abdication to the trier of the fact is not required. United States v. Peterson, 448 F.2d 645, 649 (5th Cir. 1974), cert den 419 U.S. 828.

The evidence against the Appellant Bas, when viewed in a light most favorable to the Government, was so insubstantial as to require a reversal of the verdict. The record below reveals that the Government failed to meet its burden of substantial proof.

The only evidence presented by the Government which even suggested that Mr. Bas knew of the crimes charged came from Susan Abbott. She testified that Mr. Crutch sent her to Bas' shop while Crutch was in prison. The purpose of the visit was to request Mr. Bas to print blank personal checks. Miss Abbott testified that at this first meeting she spoke to Mr. Bas about the Minneapolis Coin crime (Indictment Counts 7 and 8, [17, 18a]),

(48, 49a). This was the only evidence offered which tended to prove that Mr. Bas had knowledge of the commission of any of the substantive crimes charged. Miss Abbott's direct testimony and her answers on cross examination indicate how insubstantial the evidence concerning Mr. Bas' knowledge was.

A. And to establish the fact that I had been with Ike, we just discussed the past events of the year, such as the fiasco of the Continental Coin Company - -

Q. What did you discuss in particular, what did you describe as a fiasco?

A. The day Ike went to Lou and was in such a big rush to get the letterhead and the checks and everything made out, the day that Jerry - - (48a).

. . .

Q. Tell us about that, Miss Abbott, please, about the discussion of the Minneapolis Coin Company.

A. And how Ike was very positive in every transaction that had gone down, he was a very confident person and that he was sure that everything was going to be all right. It was mostly our conversation about Ike.

Q. Did you recall discussing any transactions other than the Minneapolis coin transaction?

A. Yes, we talked -- we also -- to the best of my recollection, I believe we talked about the different checks, the ones that had worked, the one's that didn't work. (48, 49a).

This very nebulous, yet most damaging testimony was focused on during cross-examination.

Q. Miss Abbott, did you testify yesterday that at this first meeting with Mr. Bas you discussed one coin deal with him?

A. There was a discussion of that, yes.

Q. But you couldn't remember other deals that may have been discussed at that time, is that correct?

A. Not to my exact memory, no.

Q. You also, I believe, said that you couldn't remember exactly what was said is that correct?

A. Correct.

Q. Now, Miss Abbott, if a third party, who knew nothing about what had transpired previously, had overheard the conversation between yourself and Mr. Bas concerning the coin deal, what would he have heard that would have indicated to him that something illegal had happened?

...

A. That checks were prepared in a matter of hours.

Q. That checks were prepared in a matter of hours?

That would indicate that something was illegal?

A. I can only hypothetically answer. I don't know.

Q. What else would he have overheard that would indicate to him that something illegal had happened?

A. I really don't know. (65, 66a).

The cross examination of Miss Abbott revealed that other than the above meeting, she met with Mr. Bas on approximately eight occasions but could not remember one conversation with Mr. Bas concerning illegal activities (66-73a). Thus, Abbott's testimony was totally devoid of substantial evidence that Mr. Bas had actual knowledge of the illegal activities charged in the twenty nine count indictment. The only testimony concerning Mr. Bas' knowledge of the substantive crimes charged concerned counts 7 and 8, yet, he was acquitted on those counts.

Miss Abbot's testimony also proves that when she ordered blank checks from Mr. Bas and used them fraudulently, she never told Bas of her actions either before or after the crime was committed. One of the orders Miss Abbott placed with Mr. Bas was for blank checks on the personal account of one Catherine Marstairs. Abbott forged the check and purchased \$6,000 worth of English pounds. She used the services of other legitimate people to pull off the swindle. When she received the money, she was instructed by Mr. Crutch as to what to do with the money. She was instructed to pay Mr. Bas \$500 and did so at a dinner meeting. (50-55a). On direct examination she was asked:

Q. Do you recall any conversation at dinner?

A. All our conversation was about Ike and the trouble he was in and whatever; it was always about Ike. (55a).

On cross examination, Miss Abbott was asked:

Q. Then there was a fifth meeting with Mr. Bas? Where did that take place?

A. Sometime in the interim I paid Mr. Bas \$500 for the checks -- for the money I had acquired on the Catherine Marstairs account.

Q. So there was another meeting, where you paid him the money, is that correct?

A. Yes, at the Italian restaurant again.

Q. And did you have a discussion with Mr. Bas during this meeting?

A. That was more or less just a social meeting. We talked about his family, how was he, how was I. (71a).

In substance, the evidence merely indicated that Abbott ordered blank checks from Bas, as did Crutch previously, but never told Bas of her illegal intention. Even after the crime

was successfully completed, she never indicated to Bas what had happened. In this connection, it is also important to note that Crutch's instructions to Abbott as to the split of the money revealed that while the actual participants were to receive a percentage of the take, Bas did not. (54a). Bas testified that the \$500 he received was for the numerous jobs he had performed for Abbott plus money owed him for previous work done for Crutch. Bas was never told that the money he received came from a successful illegal act. This \$500 payment was the only payment to Bas proven by the Government.

Miss Abbott's testimony concerning Mr. Bas' knowledge of the illegal activities was also admittedly based on her own baseless assumptions:

Q. When you were interviewed (by the FBI), didn't you say to the FBI agents that you couldn't go to the printer at this time because the printer is aware that you had been arrested and is aware that an investigation was taking place?

. . . .

A. Yes.

Q. How did you know at the time that the printer was aware of the investigation?

A. It was only an assumption on my part because of Mr. Crutch's knowledge of my cooperation.

. . . .

Q. And you assumed that because Mr. Crutch knew about your cooperation that Mr. Bas knew what was going on?

A. Yes.

. . . .

Q. You did not make that assumption as a result of any conversations that you had with Mr. Bas, is that correct?

A. No. That's true, (63,64a).

It cannot be overemphasized that Mr. Bas produced blank checks. Although Bas was alleged in overt act number one to have provided Crutch with "counterfeit bank checks", the Government itself proved that the copies of bank checks produced by Bas were in blank form when given to Crutch. Mr. Bas is not mentioned again in the following seventy-eight overt acts. The Government does not dispute that the checks were transformed into fraudulent negotiable instruments only after they left Mr. Bas' hands. "An unsigned check, the validity of which is dependent upon the signature of the person who makes the check or uses it, is susceptible of use as an instrument of fraud, but it is not counterfeit. It is not a false image or resemblance. It actually purports to be nothing more than what it is, an invalid instrument because unsigned. It does not of itself deceive anyone." Metropolitan National Bank of Minneapolis v. National Surety Co., 48 F.2d 611 (Dist. Court Minn., 1937). In this same connection see Beam v. United States, 364 F.2d 756 (6th Cir., 1966) at 759 wherein the Court held, "It seems to this Court that the term "securities" was used by Congress to refer to forms of negotiable instruments which in themselves had monetary value. In addition, we feel that the definition in § 2311 should be read in pari materia. So read, every defining term (including 'evidence of indebtedness' in one of its meanings) is that of an instrument which has value in itself, is capable of being negotiated and hence is of value to a forger or a thief." The checks produced by Mr. Bas contained no payee,

no amount, no date, no signature and in the case of the blank checks, no validating stamp or certification.

In United States v. Gallishaw, 428 F.2d 760 (2nd Cir., 1970), the defendant gave alleged co-conspirators a machine gun. He was told by one of them that if he didn't pull a bank job, "I will pull something else to give him the money." The jury asked, "Does the supplying of a gun, which is subsequently used in a bank robbery, constitute grounds for a conspiracy if the person who rents the gun doesn't know how or where the gun will be used?" The trial judge answered in part, that the jury could convict if Gallishaw rented the gun with the knowledge "that there was a conspiracy to do something wrong and to use the gun to violate the law." The Court held at 763, "Under this instruction, the jury may simply have drawn the perfectly reasonable inference that one who rents a machine gun knows it is likely to be used 'to do something wrong or to violate the law and therefore convicted Gallishaw totally without regard to anything Thomas said, of the conspiracy charged in the indictment. A verdict on such a basis would have been improper. In Ingram v. United States, 360 U.S. 672 (1959) the Supreme Court stated:

Conspiracy to commit a particular offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.

On the record, to convict Gallishaw for the substantive crime of aiding and abetting a violation of 18 U.S.C. §2313(a), the Government would have to show at a minimum that he knew that a bank was to be robbed. To convict him of conspiracy, at the very least no less was required." Here, the Government never offered proof that Mr. Bas was aware that the blank check he produced would be or

was converted into a negotiable instrument to defraud Apollo Distributing Company of \$14,000 for which he was convicted on Counts Fifteen and Sixteen. Likewise, the Government offered no proof, that Mr. Bas was aware that the blank checks which he produced would be used in an attempt to defraud unknown persons of \$1,750,000 by transporting interstate the forged checks, described in count Seventeen, for which he was convicted. The Government did not attempt to prove that Mr. Bas had knowledge that the blank check he produced would be used to attempt to defraud Milton Rusonik of his Rolls Royce automobile, for which he was convicted on counts Twenty-Five, Twenty-Six and Twenty-Seven. There was not even an attempt by the Government to prove that Mr. Bas was informed of the crimes he was convicted of after they were completed. Thus, the Government never attempted to prove that Mr. Bas had knowledge of, or a stake in any of the illegal ventures, that he had a desire to see said crimes completed or that he received a penny as a result of the crimes he was convicted of.

As stated in Direct Sales v. United States, 319 U.S. 703 (1943) at 711:

Without knowledge the intent cannot exist . . .
Furthermore, to establish the intent, the
evidence of knowledge must be clear, not equivocal . . .
This, because charges of conspiracy are not to
be made out by piling inference upon inference,
thus fashioning . . . a dragnet to draw in all
substantive crimes.

Stated otherwise, "One must embark on a particular venture with which he knowingly associated himself and which he consciously sought to make succeed." United States v. Howell, 447 F.2d 1114 (2d Cir., 1974). The Government's case clearly proves that Mr.

Bas had no desire to make the crimes he was convicted of succeed. On the contrary, Mr. Bas had no common criminal purpose with Mr. Crutch.

Another case on point is United States v. Kilcullen, 546 F.2d 435 (1st Cir. 1976) wherein a lawyer was charged with conspiracy to transport interstate, forged, falsely made and counterfeit checks, 18 U.S.C. § 2,371 and 2314, as was Mr. Bas. In discussing the sufficiency of the evidence of knowledge, the Court held against the appellant because he was a lawyer, former editor of the Harvard Law Review, had a background and training in law and banking practices and he was suffering from financial difficulties. Additionally, the Court held that in determining knowledge, it was important to note that he was a close friend of the mastermind and was personally involved in the negotiation of the forged checks. Here, the appellant is merely a tradesman, barely knew the mastermind, had no training or background in banking practices and was never connected to the actual negotiating of the forged checks.

See also United States v. Borelli, 336 F.2d 376 (2d Cir. 1964), cert den 379 U.S. 960 (1964) wherein the Court stated at 385, "If, in Judge Learned Hand's well known phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own.' United States v. Falcone 109 F.2d 579 (2d Cir. 1940), affd 311 U.S. 205. It becomes essential to determine just what he is promoting and making his own." Here, the Government never offered proof that Bas knew of the ventures for which he was convicted let alone that he promoted them.

Another case akin to the issue presented is United States v. Rosenblatt, 554 F.2d 36 (2d Cir., 1977). Rosenblatt agreed to launder money for Brooks. They were both convicted of conspiracy to falsify postal records. Rosenblatt was told by Brooks that the money needed laundering so that Brooks could cheat the Internal Revenue Service. The Court, in finding that Rosenblatt had no intention to aid in falsifying postal records held, "Thus it is clear that a general agreement to engage in unspecified criminal conduct is insufficient to identify the essential nature of the conspiratorial plan. Proof of the essential nature of the plan is required because the 'gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant. United States v. Borelli, supra. The importance of making the determination cannot be overstated. 'Agreement is the essential evil at which the crime of conspiracy is directed' and it, 'remains the essential element of the crime.' Ianelli v. United States, 420 U.S. 770, 777, N. 10 (1975). . . . Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it.' United States v. Peoni, 100 F.2d 401 (2d. Cir. 1938)."

In conclusion, looking at the evidence presented in a light most favorable to the Government, the only agreement between Mr. Bas and Mr. Crutch was that Mr. Bas produced blank checks as ordered and paid for by Mr. Crutch. There was no evidence presented which would indicate that Bas and Crutch embarked upon an agreement to violate any law. Nor was there any proof that Bas had knowledge of or a stake in any of the acts for which he was ultimately con-

victed. Mr. Bas' intention was a unilateral one whereby he produced blank checks and received payment.

As a Post Script, it is pointed out that when Bas' counsel made a motion to dismiss after the Government rested, the following exchange took place:

Mr. Miller: I think that as a matter of law, that there is reasonable doubt as to Mr. Bas' state of mind.

The Court: There may be certainly a reasonable doubt as to his state of mind, but at the present time there is reasonable doubt as to all of them. Reasonable doubt is not removed until the jury rules on it.

Mr. Miller: It is my understanding that if at the end of the prosecution's case that as a matter of law the Court finds there is reasonable doubt it should be dismissed.

The Court: If I find that as a matter of law in regard--all right, I have heard your argument (82a).

In a similar situation, in United States v. James, 528 F.2d 999 (5th Cir., 1976) a conviction for conspiracy to commit offenses of assault on federal officers, was overturned when during a discussion of the sufficiency of the evidence, the trial judge stated "[I] determine that there is substantial evidence upon which a jury might reasonably base a finding that the defendants are guilty beyond a reasonable doubt of the charges against them in the indictment although I have some questions in my mind concerning the defendant Anna Lockhart . . ." Despite the judge's stated feelings, he allowed the case to go to the jury and Lockhart was convicted. The conviction was overturned by the Appeals Court because of the judge's expressed finding of reasonable doubt.

ARGUMENT III

ONE WHO KNOWINGLY PROVIDES LAWFUL SERVICES
OR GOODS WHICH AIDS A CONSPIRACY IS NOT
NECESSARILY CULPABLE UNDER THE CONSPIRACY
STATUTE

Assuming arguendo that Mr. Bas had knowledge that the blank checks produced would be used in a scheme to defraud, he is still not criminally culpable under the Conspiracy Statute. According to Judge Learned Hand, if a defendant, having knowledge of the conspiracy, is shown only to have supplied the enterprise with lawful products or services, a conspiracy conviction cannot stand.

In United States v. Falcone, 109 F.2d 579 (2d Cir., 1940) affd. 311 U.S. 205 (1940), a large number of defendants were convicted of conspiring to operate illicit stills in violation of federal revenue laws. The evidence against Falcone was that he sold tremendous quantities of sugar to grocers in New York. The evidence also indicated, according to Judge Hand, that the sugar was being utilized for the stills and that Falcone was on notice that his customers were supplying the distillers. The sale of the sugar was lawful. Nevertheless, the Government charged Falcone with conspiracy on the theory that he not only knew of the existence of the conspiracy and was aiding it, but he also fully intended to participate because he profited from his association with the conspiracy. Although Judge Hand conceded Falcone's knowledge of the illegal use of the sugar, he rejected the Government's argument. Judge Hand recognized that criminal liability may result simply because an actor fails to forbear from activity that ultimately aids wrongful conduct. He emphasized, however, that in conspiracy cases the accused's, "attitude towards the forbidden

undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself." Falcone at 581. He noted at 582, that the "opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that can be avoided." The convictions of Falcone and others were reversed because the knowledge, actual aid, and profit were not enough to demonstrate "a purpose to do what the law in fact forbade."

By way of contrast, Direct Sales Co. v. United States 319 U.S. 703 (1943) the Supreme Court held that in a different type of situation from Falcone, knowledge of the illegal acts plus aid equals participation in the conspiracy. The defendant was a corporation convicted of conspiracy to violate the federal narcotics law. The corporation was a registered drug manufacturer and wholesaler conducting a nationwide mail order business. Dr. Tate purchased drugs from Direct Sales. The Government established that Dr. Tate illegally distributed morphine while he was purchasing drugs from the corporation. The evidence not only indicated the huge quantity of drugs Dr. Tate ordered, but also Direct Sale's knowledge of the use of the drugs. Officers of Direct Sales knew all of these facts. The Bureau of Narcotics warned the defendant during this period that "it was being used as a source of supply by convicted physicians", at 707. Direct Sales, however, continued to supply Dr. Tate, and more importantly, continued to encourage large orders of drugs. In holding against Direct Sales, the Court was most impressed by the dissimilarities between it and

Falcone. In Falcone, the Court held, the goods supplied were "articles of free commerce . . . not restricted as to sale . . . " Direct Sales at 709. Further, the Court found that the drugs were "incapable of further legal use except by compliance with rigid regulations." The Court found the dissimilarity crucial for two reasons. First, the restricted nature of the drugs made certain the seller's knowledge of the buyer's intended illegal use of the drugs. Second, the restrictive quality of the drugs indicated that by selling the drugs the defendant intended "to further promote and cooperate in [the distribution of the drugs]". Direct Sales at 711. The Court concluded that, if the defendant was distributing excessive amounts of restricted goods, the jury was justified in inferring Direct Sales' "unlawful intent to further the buyers' project." at 715. The evidence of the Government's extensive control over the distribution of morphine coupled with the defendant's willingness to supply Dr. Tate's large orders of the drug convinced the Court that the defendant fully intended to assist the doctor in his illegal activity. The evidence not only indicated Direct Sales' "fully informed and interested cooperation" with Dr. Tate, but also the petitioner's "stake in venture" which, even if it may not be essential, it not irrelevant to the question of conspiracy," at 713. The Court held at 713,

[Falcone] comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally. The Government did not contend in those circumstances, as the opinion points out, that there was a conspiracy

between the buyer and seller alone. It conceded that on the evidence neither the act of supplying itself nor the other proof was of such character as imported an agreement or concert of action between the buyer and seller amounting to conspiracy.

The crucial distinctions discussed in *Falcone* and *Direct Sales* apply to the case at bar. Mr. Bas was selling a completely unregulated commodity. In fact, Bas advertised that he sold blank checks to the public. (43a). Secondly, Bas was not put on notice that his product was actually being used illegally. The Government offered no proof of Bas' stake in the venture. Finally, and most important, Bas agreed merely to provide Crutch with a lawful product and there was no proof of an agreement between them to embark upon an illegal venture.

Although a reasonable man might conclude that Bas had knowledge that Crutch would put his lawful product to an unlawful use, more is required to sustain a conviction for conspiracy. The Government has failed to prove the other essential elements as discussed above. "Knowledge of the existence of a conspiracy is not alone enough to constitute one a party to it." United States v. Potash, 118 F.2d 54, 57 (2 Cir. 1941).

"The mere fact that a defendant may know that others have formed a conspiracy or be present when other people were talking about the conspiracy or have a friendship, an employment or association of any kind of business relationship with another member of the conspiracy is not in itself enough to make him a conspirator unless you first find that he knew of the conspiracy and of its purpose, and voluntarily and knowingly joined with an intent to promote its unlawful purpose." United States v. Guillette, 547 F.2d 743 (2d Cir. 1976).

In scrutinizing Falcone and Direct Sales, supra, it is submitted that the conspirators in the present case, by merely having possession of the blank checks were in the same boat as the grovers with the sugar in Falcone. The blank checks by themselves were useless. In order to convert them into an illegal instrument they had to forge them, set up fictitious businesses and ultimately complete the difficult task of negotiating them. By contrast, the product in Direct Sales was instantly convertible to a criminal enterprise.

In conclusion, Mr. Bas, as a sole proprietor of a small unregulated business should not be held accountable in the same manner as the defendant in Direct Sales. Such a burden would have the effect of requiring small legitimate businessmen to determine how their potentially dangerous or illegal product will be used. Many products such as cars, paraphernalia for smoking marijuana, blank prescription pads or copies of corporate stationery are susceptible to being converted into an illegal use. The conspiracy laws were not intended to place sellers of such items in a peril which could result in a five year prison term.

copy received
Jerry G. Epstein
A. U. S. A.

2/1/78

10:50 A.M.

